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In the Supreme Court of the United States

OCTOBER TERM, 1954

LOUIS BERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. 29-42) has not been reported.

JURISDICTION

The judgments of the Court of Appeals (Pet. 44-45) were entered on April 22, 1955. The petition for certiorari was filed on May 2, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by a witness's inadvertent reference to a prior arrest.

2. Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes, could be convicted of the misdemeanor of filing a false return with intent to defeat the assessment.

3. Whether petitioner's unreported illicit receipts were taxable income.

4. Whether the trial court erred in the admission, for purposes of impeachment, of petitioner's prior claim of the privilege against self-incrimination before a grand jury.

5. Whether the trial court abused its discretion by conditioning petitioner's probation on his not being employed by any labor organization.

STATUTES AND RULES INVOLVED

The pertinent portions of 18 U.S.C. 1503 and 3651, Internal Revenue Code of 1939 Sections 145 (b) and 3616, and Federal Rules of Criminal Procedure 31(c) and 32(e) are set forth in the Appendix, *infra*, pp. 11-15.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Missouri on two counts charging him with corruptly endeavoring to obstruct justice by requesting the

destruction of certain records and by influencing a witness, in violation of 18 U.S.C. 1503 (R. 1-5). On May 28, 1954, petitioner was indicted on three counts of wilful attempt to evade income taxes by filing fraudulent returns in violation of Section 145(b) of the Internal Revenue Code of 1939 (R. 5-7). The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

		Reported		Corrected	
		Income	Tax	Income	Tax
Count I	(1951)	$5,177.22	$566.54	$8,669.88	$1,324.42
Count II	(1952)	5,514.50	691.42	7,464.50	1,149.86
Count III	(1953)	5,293.34	775.52	6,193.34	984.76

The two cases were consolidated for trial. After a jury trial petitioner was found guilty as charged (R. 221-222). Petitioner was sentenced to imprisonment for a period of four years on each of the three counts charging tax evasion, all terms to run concurrently (R. 235-236). On each of the two counts charging obstruction of justice, sentence was suspended and the petitioner was placed on probation for a period of five years, to commence upon completion of the term of imprisonment. Probation was granted upon the condition that petitioner not be employed by any labor organization. (R. 233-234.) The Court of Appeals reversed the judgment of conviction on one of the counts charging obstruction of justice and affirmed the judgments on the other counts of that indictment and the tax evasion charges (Pet. 29-42).

The evidence to support the verdicts may be summarized as follows:

During the years 1951, 1952 and 1953, petitioner was the business manager [1] of the St. Louis Labor Health Institute, a non-profit organization furnishing free medical aid to members of Teamsters' Local 688, American Federation of Labor, and their families. Petitioner was authorized to approve bills and sign checks. The counter-signature of another employee was also required. (R. 52, 55, 120, 128, 153.) Petitioner was not authorized to cash or endorse checks (R. 143).

One John F. Schmidt did painting work for Labor Health Institute. At petitioner's request Schmidt billed Labor Health Institute in amounts which overstated the cost of labor. Schmidt was paid these padded amounts by checks drawn on Labor Health Institute's bank account and counter-signed by petitioner. By checks drawn on his own bank account, Schmidt then paid to petitioner the amounts of the overpayments. Schmidt deducted these overpayments on his income tax returns. Over the three years involved these payments to petitioner amounted to some $5,000. Also, approximately $4,000 to $4,500 worth of work at petitioner's home done by Schmidt and by Shulman and Sons Contracting Company was billed to and paid by the Labor Health Institute. (R. 54-56,

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[1] Although petitioner was officially business manager only until September, 1952, he performed the same duties for the remainder of 1952 and 1953 (R. 52).

67-73, 89.) Petitioner did not report these amounts on his income tax returns (R. 49-51, 108-120).

After an investigation of Labor Health Institute's records was commenced, petitioner contacted Schmidt at various times and sought to persuade him to destroy his records. Petitioner also urged Schmidt, in the event he was called before the grand jury, to testify that the payments were loans. (R. 48-49, 74-75, 77-78, 104-106.)

ARGUMENT

1. In response to a question as to when petitioner asked Schmidt to destroy certain records, Schmidt testified on direct examination that "* * * after Mr. Berra was arrested, why he called me up * * *." (R. 73.) It then developed that the arrest had no connection with this case. The reference to the arrest was unsolicited and was made only to fix the time of an event. It was not brought out for the purpose of reflecting upon the petitioner's reputation or character, but was purely incidental to Schmidt's testimony relating to the time of his conversations with petitioner. See *Means* v. *United States*, 65 F. 2d 206 (C.A. D.C.). We think the two courts below correctly concluded that this completely colorless testimony could have had no effect on the jury, and was simply the sort of immaterial incident that sometimes occurs during a trial. The request for a mistrial was properly denied.

Petitioner relies entirely upon *United States* v. *James*, 208 F. 2d 124 (C.A. 2d), and *Michelson* v.

United States, 335 U.S. 469. The *James* case involved testimony as to a prior arrest of defendant given by a Government narcotics officer, a witness who, as the court below pointed out (Pet. 37), "it may be assumed, was more familiar with courtroom rules of evidence than was witness Schmidt in the present case." The *Michelson* case involved the propriety of a question put by the prosecutor specifically calling for information about an arrest some twenty years before the trial, and this Court held that under the facts of that case it was not prejudicial error to permit the question. In the instant case there is merely a chance remark not sought by the prosecutor.

2. Petitioner challenges (Pet. 14-15) the trial court's refusal to charge the jury that petitioner could be found guilty of the lesser offense of making a false return with intent to defeat the assessment, in violation of Section 3616(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 14). This raises the same issue as is presented in *Dillon* v. *United States*, 218 F. 2d 97 (C.A. 8th), certiorari granted April 25, 1955, No. 629, October Term, 1954. Accordingly, the Government does not oppose the granting of a writ of certiorari on this issue.

3. Petitioner contends (Pet. 15-24) that the funds in question represented the proceeds of embezzlements from the Institute and therefore, under *Commissioner* v. *Wilcox*, 327 U.S. 404, did not constitute income taxable to him. Whatever

vitality that case may now have,[2] it is plainly inapplicable here because the funds were not embezzled. Petitioner was not in possession of the funds before the wrongful taking for they resided in the Institute bank account and he could not get possession without the counter-signature of another employee. That signature was obtained upon the presentation of false invoices. Petitioner's conduct, therefore, did not amount to embezzlement (*State* v. *Harrison*, 347 Mo. 1230) but did constitute swindling or obtaining money by false pretenses (*Rollinger* v. *United States*, 208 F. 2d 109 (C.A. 8th)), the proceeds of which are taxable to him as income (*Rutkin* v. *United States*, 343 U.S. 130; *Briggs* v. *United States*, 214 F. 2d 699 (C.A. 4th), certiorari denied, 348 U.S. 864; *Marienfeld* v. *United States*, 214 F. 2d 632 (C.A. 8th), certiorari denied, 348 U.S. 865).

Assuming *arguendo* that the funds were embezzled, petitioner's argument that they were not income to him still fails, for the proper test of whether unlawful gains constitute income has been set forth by this Court in *Rutkin* v. *United States*, *supra*, as follows (343 U.S. at 137):

> An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic

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[2] In *Rutkin* v. *United States*, 343 U.S. 130, 138, this Court, speaking of the *Wilcox* case, *supra*, said, "We limit that case to its facts."

value from it. *Burnet* v. *Wells*, 289 U.S. 670, 678; *Corless* v. *Bowers*, 281 U.S. 376, 378. That occurs when cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though it may have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it.

4. On direct examination petitioner testified that he kept a record of all the "loans" from Schmidt and that he had no reason to hide anything. (R. 147, 150-152.) For the purpose of impeachment (R. 167) the trial court admitted evidence of petitioner's prior grand jury testimony wherein he refused to answer questions regarding transactions with Schmidt on the grounds that such answers might tend to incriminate him. Petitioner asserts (Pet. 25-27) this was an impairment of his privilege and that the trial court erred in refusing to instruct the jury that it might not consider the claim of privilege in determining petitioner's guilt.

The rule is that a defendant who takes the stand in his own behalf waives completely his privilege. In *Raffel* v. *United States*, 271 U. S. 494, this Court upheld questions asked of a defendant at a second trial as to why he had not taken the stand at the first trial. The Court stated at p. 499:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not

> for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness.

See also *Viereck* v. *United States*, 139 F. 2d 847 (C.A. D.C.), certiorari denied, 321 U.S. 794; *United States* v. *Klinger*, 136 F. 2d 677 (C.A. 2d), certiorari denied, 320 U.S. 746; *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C.A. 2d), certiorari denied, 333 U.S. 860, rehearing denied, 333 U.S. 883, all of which are on all fours with the holding of the court below. It was not error to refuse the requested instruction since the trial court had made it clear during the trial that the evidence was being admitted to contradict petitioner's position taken on the witness stand.

5. Petitioner contends (Pet. 27) that there is no reasonable relationship between his conviction for obstruction of justice and the condition of probation that he not be employed by a labor organization. The argument ignores the facts of the case and the purpose of probation to serve "the ends of justice and the best interest of the public as well as the defendant." (18 U.S.C. 3651; Appendix, *infra*, pp. 12-13.) The Court of Appeals for the Ninth Circuit considered a similar objection to a probationary condition forbidding convicted defendants from being employed as stewards on railroads and found the claim of error "obviously frivolous and its consideration a waste of the time and energy of this court". *Stone* v.

United States, 153 F. 2d 331, 333. Clearly there was no abuse of discretion here.

CONCLUSION

Since a writ of certiorari has been granted in *Dillon* v. *United States*, *supra*, to determine whether the rule of lesser offenses applies to wilful attempt to evade taxes, and the same issue is involved in this case, to this extent the Government does not oppose the petition. It is submitted that no other question warranting review is presented and that on all other issues the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1955

APPENDIX

18 U.S.C.:

SEC. 1503. *Influencing or injuring officer, juror or witness generally*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influ-

show a violation of the latter.[13] "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law * * *." *Rosenberg* v. *United States*, 346 U. S. 273, 294 (opinion of Clark, J.); *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *United States* v. *Gilliland*, 312 U. S. 86, 95–96; *Blockburger* v. *United States*, 284 U. S. 299, 304; *United States* v. *Noveck*, 273 U. S. 202, 206–207; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Hammer* v. *United States*, 271 U. S. 620, 625; *Gavieres* v. *United States*, 220 U. S. 338, 342. In such a situation the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.[14] *United States* v. *Noveck*, *supra*;

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[13] There is no question of double jeopardy here, since the Government has not attempted to prosecute petitioner under both statutes. If it had so attempted, the question would depend on whether each offense "requires the proof of a fact not essential to the other." *Pereira* v. *United States*, 347 U. S. 1, 9, and cases cited. We think it clear that under that test the Government could not prosecute petitioner under both Section 145 (b) and Section 3616 (a) for filing a false income tax return with intent to evade the tax.

[14] It cannot be suggested that petitioner's indictment for a felony rather than for a misdemeanor was at the mere whim of the United States Attorney. The latter acted under the supervision of the Department of Justice; and in any event the actual accusation was made, not by the prosecuting officers of the Government, but by the grand jury, which had the power and the duty to return an indictment for any alleged crime within its jurisdiction, and to specify the particular statute which the defendant is charged with having violated. Rule 7 (c); *Sullivan* v. *United States*, 348 U. S. 170, 173, and cases cited. "The Constitution itself makes

United States v. *Gilliland, supra;* cf. *General Motors Corp.* v. *United States,* 286 U. S. 49, 56.

The fact that prosecution under the felony statute increases the maximum possible punishment is of no significance. "The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations." *United States* v. *Gilliland, supra,* at 95. The question of punishment is for the trial court, not the jury, to determine. Thus, in the instant case the trial court, notwithstanding that the conviction was for a felony, certainly could have imposed sentence of substantially less than the 4

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the grand jury, a part of the judicial process. It must initiate prosecution for the most important federal crimes. * * The proceeding before a grand jury constitutes 'a judicial inquiry', *Hale* v. *Henkel,* 201 U. S. 43, 66, of the most ancient lineage." *Cobbledick* v. *United States,* 309 U. S. 323, 327. In performing their statutory duty to "prosecute for all offenses against the United States" under the supervision of the Attorney General (28 U. S. C. 507), United States Attorneys have a high degree of discretion as to what matters shall be presented to the grand jury, including the initial choice (which the grand jury is, of course, free to accept or reject) of the statute under which a criminal prosecution is to be brought, *Hale* v. *Henkel, supra; United States* v. *Thompson,* 251 U. S. 407; *Confiscation Cases,* 7 Wall. 454, 457; *Deutsch* v. *Aderhold,* 80 F. 2d 677, 678 (C. A. 5); *District of Columbia* v. *Buckley,* 128 F. 2d 17, 20–21 (C. A. D. C.); *Clemons* v. *United States,* 137 F. 2d 302, 305 (C. A. 4); *United States* v. *Brokaw,* 60 F. Supp. 100 (S. D. Ill.); *Howell* v. *Brown,* 85 F. Supp. 537, 539–540 (D. Neb.); *United States* v. *Lange,* 128 F. Supp. 797, 799 (S. D. N. Y.).

years' imprisonment actually imposed, had it considered a milder sentence to be justified by "the circumstances and gravity" of petitioner's violations.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be affirmed.

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